IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-830

CHARLES VINSON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner Charles Vinson respectfully prays that a writ of certiorari issue to review the final judgment of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 27, 1979, affirming petitioner's conviction in the United States District Court for the Eastern District of Kentucky.

DECISION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is not yet reported. A copy of the opinion appears in the appendix.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether petitioner was denied his constitutional right to a fair trial by the trial court's refusal to sever his case from that of his codefendant, where serious prejudice to petitioner resulted from the codefendant's assertion of a contradictory and antagonistic defense.

2. Whether petitioner was denied his right of confrontation by the trial court's restriction of cross-examination of a key government witness concerning an event directly relevant to the witness' bias and motive for testifying falsely against petitioner.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, which provides in pertinent part:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

The Sixth Amendment to the United States Constitution, which provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.

STATEMENT OF THE CASE

Introduction

In a three-count federal indictment filed in the Eastern District of Kentucky, petitioner Charles Vinson was indicted together with Arlie B. Thompson. The indictment

charged Vinson and Thompson with one count of conspiracy to violate the Hobbs Act, 18 U.S.C. § 1951, and two substantive counts of extortion in violation of 18 U.S.C. § 1951.

After a joint trial, the jury returned guilty verdicts on all counts on August 30, 1978. On September 18, 1978, the trial court sentenced petitioner to concurrent four-year sentences on counts one and two and a consecutive ten-year sentence and $10,000 fine on count three. The sentence and fine on count three were suspended and probation imposed for a period of five years beginning on release from the concurrent four-year sentences. On September 27, 1979, the United States Court of Appeals for the Sixth Circuit affirmed petitioner's conviction.

Before trial, Vinson and Thompson moved for severance of defendants, arguing that a joint trial would result in unfair prejudice because their respective defenses were highly antagonistic (Tr. 4).[1] The trial court denied these motions (Tr. 6, 7).

The Government's Case

By the evidence introduced at trial, the government sought to prove that between January and June 1978, petitioner Vinson, then the sheriff of Lawrence County, Kentucky, conceived a plan for the extortion of payments from coal companies hauling coal through Lawrence County. The government's theory was that Vinson devised the plan expecting to involve Lindsey Ray "Bo" Davis, the jailer of Lawrence County, in its execution. When Davis later told Vinson he would not participate in the scheme, Vinson turned to Lawrence County Magistrate Arlie B. Thompson for assistance. (Tr. 155-164.)

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[1] As used herein, "Tr." refers to the official trial transcript, which is consecutively paginated.

The government's principal trial witnesses were James Williamson, the vice president of Riverside Coal Company and alleged recipient of the extortionate communications, and Lindsey Davis, named as an unindicted co-conspirator. According to these two, the following events occurred.

On April 6, 1978, Vinson and Davis drove to the Riverside Coal Company office in Proctorville, Ohio, to talk to Williamson. Vinson first asked Williamson if Riverside might be interested in buying some coal that Vinson had stockpiled from his dredging operation in the Big Sandy River. After Williamson showed little interest in buying the coal that Vinson wanted to sell him, Vinson told him that Riverside would have to pay 25 cents per ton on all the coal that Riverside hauled through Lawrence County. (Tr. 204-206.) Davis did not actively participate in the conversation (Tr. 389-390). Williamson said that he would have to contact his superiors before he would agree to make any payments to Vinson. Williamson immediately informed his superiors of the contact by Vinson. They in turn notified the FBI, which commenced an investigation of the case. (Tr. 211.)

Five days later, on April 11, 1978, Williamson telephoned Vinson to arrange a meeting to discuss the proposal further. This conversation was recorded by the FBI. The next day, Williamson drove from his office in Proctorville to Vinson's office in Louisa, Kentucky. Upon arrival, Vinson and Williamson drove out to land on which Davis was building a new house. Davis joined them and the three held negotiations concerning the payments sought by Vinson. The parties agreed to set the price at 15 cents per ton for coal hauled from some mines and 10 cents per ton for others. (Tr. 239-240.) Vinson suggested that the money be delivered once a month by helicopter to an abandoned strip mine site, where Davis would pick it up and split it with Vinson (Tr. 241-242). Davis

agreed to make the pickups (Tr. 397). At the conclusion of the meeting, Vinson and Williamson drove back into Louisa and separated (Tr. 242).

Davis followed Vinson and Williamson back to Louisa and encountered Williamson, saying that he (Davis) had decided not to be involved with the scheme any further (Tr. 398-399). Davis so informed Sheriff Vinson the next day (Tr. 401).

In a tape recorded conversation on April 24, 1978, Williamson telephoned Vinson to inquire about the method of accounting. Vinson told Williamson not to call him, and that he (Vinson) would see Williamson when the need arose (Tr. 246).

On May 4, 1978, a woman identified as "Dianne" (allegedly Vinson's secretary, Dianne Napier) called Williamson at this office and left a message instructing him to meet a man wearing red suspenders at a shopping center in Ceredo-Kenova, West Virginia, between 4 and 5 p.m. the next day. When Williamson arrived at the shopping center at the appointed hour, no one approached him. (Tr. 249-252.)

On May 10, 1978, Vinson made another trip to the Riverside Coal Company to arrange a payment on May 12 at the same shopping center between 4 and 5 p.m. Vinson told Williamson that Thompson would be making the pickup and would be wearing red suspenders. (Tr. 252-254.)

Posing as Williamson's representative, FBI Agent Ronald Anderson delivered an envelope containing $1,200 to Thompson at the shopping center in Ceredo-Kenova on May 12 (Tr. 473-477). The government offered no evidence that this envelope was delivered to petitioner.

On June 1, 1978, Williamson telephoned Vinson to arrange another payment, scheduled for June 6 at the Ke-

nova shopping center (Tr. 265). The conversation was recorded; tapes of this and other recorded conversations were received in evidence without objection by petitioner.

On June 6, 1978, Agent Anderson delivered an envelope containing $1,301 to Thompson at the shopping center. Agents who were following Thompson arrested him, still in possession of the envelope, that afternoon in Louisa. Vinson was arrested later that day. (Tr. 641-644.)

Although Williamson's testimony provided a general outline of the government's case, the most damaging evidence against petitioner was supplied by Davis, who asserted that Vinson alone conceived and orchestrated the entire scheme (Tr. 376-384). When petitioner's counsel sought to interrogate Davis about an incident directly bearing on Davis' credibility, the trial court sustained the government's objection to inquiry into the matter (Tr. 428). The incident, which had occurred during the pendency of the conspiracy charged in the indictment, concerned Davis' relationship with one Phillip Chambers. It was proffered by Vinson that Davis, acting on behalf of Chambers, had attempted to arrange protection for Chambers' planned sales of marijuana in Lawrence County. In return for such protection, Davis proposed that he and Vinson each receive a bribe of $1,200 per month from Chambers. (Tr. 431.) In precluding inquiry into the Chambers incident, the trial judge ruled that the cross-examination was foreclosed by FED. R. EVID. 608(b) because Davis' attempt to arrange the bribes was not probative of his character for truthfulness (Tr. 428).

The Defendants' Cases

Vinson and Thompson presented exculpatory claims, each supported by testimony from a variety of witnesses. Their defenses were, however, irreconcilably antagonistic to each other.

Thompson presented his case first. He contended that he had innocently served as Vinson's messenger in picking up envelopes at the shopping center on May 12 and June 6. He testified that although he did pick up and deliver the envelopes, he had no knowledge that he was participating in a criminal scheme.

Vinson, on the other hand, denied that he solicited Thompson or anyone else to make pickups for him and, indeed, that he received payments of any kind from Riverside (Tr. 924-926). He testified that all conversations with Williamson were continuing negotiations over the sale by Vinson to Riverside of coal that Vinson had previously stockpiled (Tr. 877, 884-887).[2] He specifically denied that any of his conversations with Williamson, including those recorded by the FBI, were attempts to engage in extortion (Tr. 932).

Not only were the defenses presented by Vinson and Thompson factually inconsistent, the defendants themselves were personally antagonistic. The court was required to provide separate counsel tables for them and to expand the number of peremptory challenges because they were unable to agree upon joint use of peremptories (Tr. [illegible]). During the trial one of Vinson's witnesses was threatened outside the courtroom by Thompson's daughter (Tr. 855-856).

The factual conflicts became most palpable in the defendants' dispute over whether they met in Vinson's office on May 12. Thompson testified that he delivered an envelope to Vinson at Vinson's office on that day (Tr. 726). Vinson denied receiving any envelope and called

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[2] Vinson testified that he and Williamson traveled to Vinson's stockpile on April 12 to inspect it (Tr. 885-889). Williamson had testified that they did not stop at the stockpile (Tr. 308). Two disinterested witnesses supported Vinson's version, saying that they saw Williamson with Vinson at the stockpile late on the afternoon of the 12th (Tr. 1081-1082, 1088, 1099).

as a witness Aubrey Russell, who was in Vinson's office all that afternoon and did not see Thompson (Tr. 926, 1158-1159). In rebuttal, Thompson (not the government) called Clyde Johns and Chris Rahschulte. Johns swore that he heard the voices of Vinson and Thompson in Vinson's office between 5 and 6 p.m. on May 12 (Tr. 1269). Rahschulte said that he saw Vinson and Thompson together in the courtyard outside Vinson's office at 6:20 p.m. on that date (Tr. 1288).

Thompson and Vinson also disputed the events of June 5 and 6. Thompson contended that he had a telephone conversation with Vinson around 9 p.m. on June 5, in which it was agreed that he would make a pickup on June 6 (Tr. 729). Vinson denied that conversation and called the Reverend Olin Kerns, who testified that he visited Vinson at his home on the evening of June 5, that he and Vinson were together from 7 p.m. until midnight, and that at no time did Vinson make or receive a phone call (Tr. 1030-1031).

Vinson contended that if anyone extorted money from the coal company, it was Thompson. To support that theory, Vinson called John Hempel, who told of an encounter with Thompson in January 1978, more than two months before the initial April 6 meeting between Vinson, Williamson and Davis, in which Thompson attempted to extort payments of 30 cents per ton for coal hauled through Lawrence County by Hempel's company, Energy Engineering Corporation (Tr. 831-836).

Counsel reinforced the conflicts in their final arguments. Vinson's attorney contended that Vinson was the "fall guy" or "patsy" (Tr. 1391), that Williamson had in fact offered Vinson a bribe which Vinson refused (Tr. 890-893), and that any conspiracy to extort money from Williamson or his company must have been between Davis and Thompson (Tr. 1406-1413).

Thompson's attorney put all the blame on Vinson. He argued that his client was merely an innocent messenger for Vinson and that "the evidence in this case shows that Charles Vinson did nothing more than to use Arlie Thompson as a dupe." (Tr. 1440.)

The jury convicted both defendants and the court sentenced both to terms of incarceration. Timely notices of appeal to the Court of Appeals for the Sixth Circuit were filed, and the Court of Appeals affirmed the convictions on September 27, 1979.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT THAT THE TRIAL COURT PROPERLY DENIED PETITIONER'S MOTION FOR SEVERANCE FROM HIS CODEFENDANT, WHERE THE CODEFENDANT'S DEFENSE WAS IRRECONCILABLY ANTAGONISTIC TO THAT OF PETITIONER, ERRONEOUSLY RESOLVES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW THAT HAS NOT BEEN AND SHOULD BE DECIDED BY THIS COURT

This case poses squarely a question of increasing frequency in multi-defendant criminal trials: At what point must considerations of judicial economy inherent in the concept of joinder yield to the constitutional right of every defendant to a fair and impartial trial? This case is an appropriate vehicle for clarifying a defendant's entitlement to severance under FED. R. CRIM. P. 14 when contradictory and antagonistic defenses are asserted in a joint trial.

Before trial, petitioner Vinson and his codefendant Thompson moved for severance of defendants, contending that the defenses to be asserted by the accused were irreconcilably antagonistic. They argued that the preju-

dice resulting from a joint trial would be so great that the jury would convict both defendants merely because of the contradictory nature of the defenses presented. The trial judge, apparently believing that defendants joined for trial in a conspiracy prosecution should always be tried together, denied the motion. (Tr. 5, 6, 7.)

It is axiomatic that the decision to grant or deny a severance of defendants joined for trial is within the informed discretion of the trial court. *Opper* v. *United States*, 348 U.S. 84 (1954). While the general rule is that persons indicted together should be jointly tried, *United States* v. *Gambrill*, 449 F.2d 1148 (D.C. Cir. 1971), FED. R. CRIM. P. 14 establishes an exception. The Rule provides:

> If it appears that a defendant or the government is prejudiced by a joinder of offenses or of defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires.

FED. R. CRIM. P. 14.

Where a moving defendant demonstrates prejudice arising from a joint trial with a codefendant who asserts an irreconcilable and mutually exclusive defense, denial of severance deprives the moving defendant of his constitutional right to a fair trial. *United States* v. *Crawford*, 581 F.2d 489 (5th Cir. 1978). Several federal courts have reached this conclusion. *E.g.*, *United States* v. *Johnson*, 478 F.2d 1129 (5th Cir. 1973) (where Johnson's alibi defense to charge of passing counterfeit money was contradicted by codefendant's testimony placing him at the scene, trial court's denial of Johnson's severance motion reversible error); *United States* v. *Gambrill*, 449 F.2d 1148 (D.C. Cir. 1971) (where defendant Hunter's alibi defense contradicted by Gambrill's testimony, separate

trials ordered on remand); *United States* v. *Valdez*, 262 F. Supp. 474 (D.P.R. 1967) (severance motion granted where narcotics defendant Vega indicated in a letter to the court that his sole defense would be to blame defendant Valdez).

The most recent decision analyzing the impact of antagonistic defenses on the right to a fair trial is the decision of the Fifth Circuit in *Crawford* v. *United States*, 581 F.2d 489 (5th Cir. 1978). The Court of Appeals concluded that severance is required when "irreconcilable and mutually exclusive" defenses are tendered by the accused in a joint trial. *Id.* at 491. Defendants Crawford and Blanks, after a joint trial before a jury, were found guilty of possessing an unregistered sawed-off shotgun. Police officers had arrested Blanks for driving an automobile without a valid driver's license; an inspection of the car revealed a sawed-off shotgun partially hidden under the dashboard. Since Crawford was a pasenger in the car, the government contended that both possessed the firearm.

Crawford and Blanks moved for severance under FED. R. CRIM. P. 14 before trial, arguing that, because each contended that the gun belonged to the other, their respective defenses were therefore irreconcilable and mutually exclusive. The motions were denied. The Fifth Circuit reversed, holding that considerations of judicial economy are subordinate to a defendant's right to present his case in a proceeding free from contradictory and antagonistic claims asserted by a codefendant. Without abandoning this traditional balancing approach used by other courts in evaluating the necessity of granting a severance of defendants, the Fifth Circuit in *Crawford* identified the case before it as within a discrete category of cases in which the prejudice inevitably accruing to a jointly tried defendant abridges his constitutional right to a fair trial. Judge Vance analyzed the situation in these terms:

> The sole defense of each was the guilt of the other .... Each was the government's best witness against the other. Each defendant had to confront not only hostile witnesses presented by the government, but also hostile witnesses presented by his co-defendant. Witnesses against each defendant were thus examined by one adversary and cross-examined by another adversary. A fair trial was impossible under these inherently prejudicial conditions.

Id. at 492.

Despite the guidance provided by *Crawford* and similar cases, other federal courts have reached different results when faced with parallel fact situations. *E.g.*, *United States* v. *Harris*, 542 F.2d 1283, 1313 (7th Cir. 1976), *cert. denied*, 430 U.S. 934 (1977); *United States* v. *Troutman*, 458 F.2d 217, 221 (10th Cir. 1972); *United States* v. *Addonizio*, 451 F.2d 49, 63 (3d Cir.), *cert. denied*, 405 U.S. 936 (1972); *United States* v. *Barber*, 442 F.2d 517, 529-30 (3d Cir.), *cert. denied*, 404 U.S. 846 (1971). Unlike *Crawford*, these cases have refused to adopt a categorical approach to multi-defendant prosecutions involving the presentation of irreconcilable and mutually exclusive defenses, preferring instead to weigh the competing considerations of judicial economy and prejudice on a case-by-case basis. The present case allows this Court, for the first time, to specify constitutional guidelines for the application of FED. R. CRIM. P. 14 in cases where antagonistic and contradictory defenses are raised.

The Court of Appeals' analysis of the severance issue in this case is particularly unpersuasive, nor can it be squared with the Fifth Circuit's holding in *Crawford*. While acknowledging that antagonism existed between petitioner and his codefendant and that the "codefendants attempt[ed] to blame each other", the Court of Appeals reasoned that reversal was not required because the irreconcilably antagonistic defenses neither misled nor confused the jury. (App. 7a-8a.) Under the *Crawford* line

of cases, this conclusion is erroneous. Even following the case-by-case approach adopted by other courts, jury confusion is not required to mandate severance. Moreover, the Court of Appeals decision fails to appreciate the degree of hostility, antagonism and recrimination between Vinson and Thompson at their joint trial.

Quite apart from the factual conflicts in their respective theories of exculpation and the mutually exclusive nature of their defenses, the personal antagonism between Vinson and Thompson was extreme. It necessitated the provision of separate counsel tables and an expanded number of peremptory challenges (Tr. 6), and reached its zenith during trial when one of Vinson's witnesses was threatened outside the courtroom by Thompson's daughter (Tr. 855-856). Throughout the trial the conflicting strategies of Vinson and Thompson created situations intolerably prejudicial to Vinson. Thompson called two rebuttal witnesses who contradicted portions of Vinson's defense (Tr. 1265-1291), and cross-examination of prosecution witness Williamson by Thompson's counsel was so prejudicial to Vinson that it prompted the following remarks from the trial judge during a colloquy at the bench:

> THE COURT: . . . Let me tell you something, gentlemen, you are cutting up Mr. Cline's [counsel for Vinson] client here, Mr. Creech [counsel for Thompson]. Maybe that's what you mean to do. I think you gentlemen had better get together. You're having this person [Williamson] to retestify without any qualification at all and you have just restated the Government's case. You have proved every essential element of the crime by cross-examination. If that's what you mean to do—I rarely see that come out of a defense attorney's mouth and I am somewhat surprised.
>
> MR. CLINE: We told you it was going to be an unusual case.

> THE COURT: I suppose it is but I feel sorry for you, Mr. Cline. You've got the Government jumping on you and you've got Mr. Creech jumping on you.

(Tr. 288-289.)

Closing arguments of defense counsel also highlighted the conflict. Petitioner's counsel contended that Vinson was the "fall guy" or "patsy" (Tr. 1391), that Williamson had in fact offered Vinson a bribe which Vinson refused (Tr. 890-893), and that any conspiracy to extort money from Williamson or his company must have been between Davis and Thompson alone (Tr. 1406-1413). On the other hand, Thompson's counsel argued that Thompson was merely an innocent messenger for Vinson:

> The evidence in this case shows that Charles Vinson did nothing more than to use Arlie Thompson as a dupe.

(Tr. 1440).

The strategy of each defendant, then, was to blame the other entirely for the crime. The degree of antagonism reflected in these tactics, the mutually exclusive nature of the specific factual claims of each defendant, and the personal hostility that each harbored for the other makes the argument for severance in the present case far stronger than that in *Crawford*. The prejudice to petitioner, both manifest and intrinsic, from a joint trial clearly denied him his constitutional entitlement to a fair adjudication.[3] Given the limited number of

[3] The trial court, of course, has a continuing duty to sever under FED. R. CRIM. P. 14 whenever prejudice appears during trial. *Schaffer* v. *United States*, 362 U.S. 511, 516 (1960); *United States* v. *Crawford*, 581 F.2d 489, 492 (5th Cir. 1978). As previously noted, the trial judge here was quite aware of the ongoing prejudice being suffered by Vinson as the result of Thompson's defense tactics, but declined to grant relief because of his view that conspiracy prosecutions required a joint trial (Tr. 5-6).

defendants on trial, the interests of judicial economy surely did not weigh heavily in favor of trying these defendants together. *United States* v. *Johnson*, 478 F.2d 1129, 1134 (5th Cir. 1973).

This is an important and recurring issue of federal jurisprudence. For the reasons set forth above, petitioner respectfully submits that it was decided erroneously by the Court of Appeals for the Sixth Circuit and that a writ of certiorari should therefore issue.

II. THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT THAT THE TRIAL COURT PROPERLY RESTRICTED CROSS-EXAMINATION OF A KEY GOVERNMENT WITNESS CONCERNING THE WITNESS' RECENT ATTEMPT TO BRIBE PETITIONER ERRONEOUSLY RESOLVES AN IMPORTANT QUESTION OF FEDERAL CONSTITUTIONAL LAW

The decisions of this Court throughout the years have constantly emphasized the importance of cross-examination in the criminal justice system. Described by Wigmore as the "greatest legal engine ever invented for the discovery of truth,"[4] the opportunity for adequate cross-examination of one's accusers is perhaps the most revered procedural protection available to a criminal defendant. In *Pointer* v. *Texas*, 380 U.S. 400 (1965), Justice Black stressed the practical benefits of this fundamental constitutional right:

> . . . [P]robably no one, certainly no one experienced in the trial of lawsuits, would deny the value of cross-examination in exposing falsehood and bringing out the truth in the trial of a criminal case.

Id. at 404. At the trial below, petitioner's right to cross-examine a key government witness for the purpose of

[4] 5 WIGMORE, EVIDENCE § 1367, 32 (Chadbourn Rev. 1974).

"exposing falsehood and bringing out the truth" was impermissibly limited by the trial court.

During the cross-examination of government witness Davis, petitioner's trial counsel attempted to interrogate him about a previous incident involving Davis and one Phillip Chambers. Davis had allegedly brought Chambers to see Vinson about an arrangement whereby Vinson and Davis would each receive $1,200 per month if they would afford Chambers protection for his planned sales of marijuana in Lawrence County. When Chambers' name surfaced during cross-examination, the prosecution objected on the ground of relevance. After an extended colloquy at the bench, the trial court ruled that the matter about which petitioner's counsel sought to question Davis was not probative of his truthfulness or untruthfulness under FED. R. EVID. 608(b). The court therefore refused to allow the line of questioning. (Tr. 428.) Petitioner's counsel proffered the substance of the alleged bribery attempt (Tr. 431). On appeal, the Sixth Circuit affirmed, finding no abuse of discretion and no significant harm to petitioner (App. 11a).

Petitioner respectfully submits that the trial court's erroneous interpretation of FED. R. EVID. 608(b) operated to deprive petitioner of his constitutional right to confront and cross-examine the witnesses against him. Rule 608(b) provides:

> *Specific instances of conduct.* Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, . . .

FED. R. EVID. 608(b). In excluding the line of questioning, the trial court indicated that the act in question

was not probative of the witness' truthfulness or untruthfulness: "In this case I find no basis on which to determine that the commission of another crime, even if you take the testimony as true, would affect the truthfulness of the witness." (Tr. 428.)

The trial court was wrong in deciding that an attempted bribe of Vinson by Chambers and Davis would not be probative of Davis' truthfulness or untruthfulness. Bribery is second only to perjury in the hierarchy of crimes traditionally considered relevant to truthfulness. See J. WEINSTEIN and M. BERGER, EVIDENCE ¶ 608[05], 608-28 (1978); Ladd, "Credibility Tests—Current Trends," 890 Pa. L. Rev. 166, 180 (1940). Especially where, as here, the bribery was alleged to have occurred during the pendency of the conspiracy charged in the indictment, Davis' willingness to assist Chambers in bribing Vinson was certainly relevant to Davis' veracity. See, *e.g.*, *United States* v. *McClintic*, 570 F.2d 685 (8th Cir. 1978) (cross-examination about witness' attempted swindle properly allowed by trial court); cf. *United States* v. *Crippen*, 570 F.2d 535 (5th Cir. 1978), *cert. denied*, 99 S. Ct. 837 (1979) (trial court properly allowed inquiry into character witnesses' knowledge that defendant's automobile agency had routinely turned back odometers; inquiry allowed because such action was deceitful).

This restriction on the cross-examination of Davis, the government's only "inside" witness, deprived petitioner of his constitutional right of confrontation, as articulated by this and other federal courts. Most recently, in *Davis* v. *Alaska*, 415 U.S. 308, 318 (1974), this Court found reversible error in a trial judge's restriction on cross-examination of a crucial prosecution witness by a defendant who sought to elicit from the witness information bearing on the witness' credibility. Although defense counsel was allowed to ask the witness whether he was biased, counsel was not permitted to make a record from which to argue the reasons *why* the witness should be

disbelieved. In holding that defendant had been denied the right of "effective cross-examination", the Court stressed the importance of providing the jury with sufficient information from which it could make accurate credibility assessments:

> . . . [I]t seems clear to us that to make any inquiry [on cross-examination] effective, defense counsel should have been permitted to expose to the jury the facts from which jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness.

Id. at 318. The Court characterized the restriction on cross-examination as constitutional error incapable of being cured through a showing of absence of prejudice. *Id.*

In scrupulously applying *Davis* v. *Alaska*, the circuit courts have not hesitated to reverse convictions arising from trials in which a defendant's cross-examination of an important prosecution witness has been curtailed or restricted. See, *e.g.*, *United States* v. *Crumley*, 565 F.2d 945 (5th Cir. 1978); *United States* v. *Alvarez-Lopez*, 559 F.2d 1155 (9th Cir. 1977).

The Sixth Circuit's opinion rejecting petitioner's argument on this issue cannot be reconciled with the controlling legal principles set forth above. Finding that the question regarding Davis' prior bribe attempt was "remote on credibility and unrelated to the merits", the Court of Appeals held that there had been no abuse of discretion in precluding the question nor any significant harm to petitioner (App. 11a). We respectfully disagree for the following reasons.

First, as previously noted, Davis' prior attempt at bribery of Vinson is a classic example of conduct inconsistent with truthfulness, especially where, as here, the misconduct occurred during the very time that Vinson was alleged by Davis to have organized the effort to extort payments from Riverside Coal Company.

Second, contrary to the Sixth Circuit's finding that Davis' bribe attempt was "unrelated to the merits" of the case on trial, the misconduct of Davis was in fact merely a variation of the crime with which Vinson was charged, involved many of the same individuals as those alleged to have participated in the Riverside Coal Company scheme, and involved the same kind of illegal concessions from the Lawrence County Sheriff's Office.

Third, the Court of Appeals' holding that there had been no abuse of discretion in precluding the attempted cross-examination of Davis fails completely to consider whether the restriction—be it an abuse of discretion or not—operated to deprive petitioner of his constitutional right to confront and cross-examine his accusers. Indeed, in *Davis* v. *Alaska*, a state statute *prohibited* relevation of the information sought by defense counsel on cross-examination; the trial judge's restrictive ruling, albeit in complete accord with state law, was held by this Court to have contravened the defendant's constitutional entitlement to effective cross-examination. *Davis* v. *Alaska*, 415 U.S. 308, 311-318 (1974).

Fourth, as to the Court of Appeals' view that petitioner suffered no substantial harm arising from the limitation on his counsel's cross-examination, the Court of Appeals is in error. There was abundant evidence in the record that petitioner was harmed by the trial court's ruling. The government's case was predicated in large measure on the testimony of Davis, who allegedly conferred with Vinson during the formation phase of the conspiracy and professed to have intimate knowledge of Vinson's motives and plans regarding execution of the scheme (Tr. 375-390); in fact, aside from Williamson, Davis provided the only significant evidence against Vinson. The credibility of Davis, therefore, was pivotal to the success of the

prosecution. By virtue of the trial court's evidentiary ruling, however, the jury heard nothing about Davis' character for untruthfulness from which they could make a reasoned assessment of his veracity. *United States* v. *Baker*, 494 F.2d 1262, 1267 (6th Cir. 1974). This inability to effectively cross-examine Davis on matters of his credibility clearly operated to the substantial prejudice of petitioner.

Moreover, *Davis* v. *Alaska* makes plain that *no showing of prejudice is required* when a defendant's cross-examination of an important government witness as to matters bearing on the witness' credibility is curtailed by a ruling of the trial court. *Id.* at 318. In this respect, also, the Sixth Circuit's analysis was faulty.

Because the Court of Appeals decision on this issue is inconsistent with settled principles of federal constitutional law, petitioner's conviction cannot be permitted to stand. The writ of certiorari sought herein should therefore issue to permit review of that decision.

CONCLUSION

WHEREFORE, petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX

No. 78-5406

No. 78-5412

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.

CHARLES VINSON (78-5406),
ARLIE B. THOMPSON (78-5412),
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF KENTUCKY

Decided and Filed September 27, 1979.

Before: EDWARDS, Chief Judge; KEITH and MERRITT, Circuit Judges.

MERRITT, Circuit Judge. After a jury trial in the United States District Court for the Eastern District of Kentucky, Vinson, Sheriff of Lawrence County, and Thompson, a county magistrate, were convicted of extorting money from a coal company and of conspiring

to do so. 18 U.S.C. § 1951 (1976). We affirm the defendants' convictions. The major issue on appeal is whether the District Judge followed proper procedures governing admission of co-conspirator hearsay evidence. We address questions left unanswered by our recent decision in *United States* v. *Enright*, 579 F.2d 980 (6th Cir. 1978), and establish guidelines for administering the co-conspirator exception to the hearsay rule, Fed. R. Evid. 801(d)(2)(E).

I.

During the government's case-in-chief, the District Court admitted testimony describing out-of-court statements of Sheriff Vinson which tended to incriminate Magistrate Thompson in both the conspiracy and the substantive offenses. An officer of the coal company who was the target of the extortion plan testified that the Sheriff told him that the Magistrate was his agent in the extortion scheme and would pick up the extortion payments. Upon timely objection, the District Judge instructed the jury as follows:

> That [hearsay] will not be considered by you, ladies and gentlemen, as any evidence against [the Magistrate] until you are satisfied or the Court makes a ruling of a prima facie case of conspiracy.

Further along in the government's case, the District Judge made a preliminary finding that the government had proved a conspiracy involving the Sheriff and Magistrate by a preponderance of the evidence. He then ruled that the out-of-court statements of the Sheriff, made in the course of and in furtherance of the conspiracy, could be used as evidence against the Magistrate. He instructed the jury:

> Ladies and gentlemen . . . let me advise you that the admonition that I have given you earlier in the case about not considering certain testimony as to [the Magistrate] is now withdrawn.

Both defendants objected to the judge's second statement on the ground that it amounted to an improper comment on the sufficiency of the evidence. Although we believe that the judge should have made neither statement, we find that no prejudice resulted to defendants. The government's proof of the conspiracy as well as of the substantive offense rested on strong non-hearsay evidence which showed that the Sheriff, the Magistrate and an unindicted third person conspired to and, in fact, did extort money from the coal company. Sheriff Vinson was the principal in the scheme, and the Magistrate and the third person were his agents. The three threatened to harass the coal company trucks which operated on county roads unless extortion payments were made. Two such payments were made before authorities apprehended the defendants. There was relatively little co-conspirator hearsay admitted both before and after the District Judge made his preliminary finding, and the jury had abundant, non-hearsay evidence on which to base its verdict. Moreover, any confusion which might have been caused by the trial judge's comments to the jury was cured by his final conspiracy instruction in which the elements of a criminal conspiracy and the government's burden of proof were clearly and correctly stated.

In *Enright* we held that, before the government can take advantage of the co-conspirator exception to the hearsay rule, it must show by a preponderance of the evidence (1) that a conspiracy existed, (2) that the defendant against whom the hearsay is offered was a member of the conspiracy, and (3) that the hearsay statement was made in the course and in furtherance of the conspiracy. We also held that this preliminary finding is the sole province of the trial judge. Fed. R. Evid. 104(a). In *Enright*, however, we did not decide whether, before the

judge has made his finding on the preliminary question, he may admit the hearsay subject to connection later in the trial, as did the trial judge here. We also did not decide whether the trial judge may consider the hearsay itself in making his preliminary finding.

A trial judge must have considerable discretion in controlling the mode and order of proof at trial [1] and his rulings should not cause reversal of a criminal conviction unless they "affect substantial rights." [2] Thus, we do not believe that it is appropriate to set forth hard and fast procedures. Rather, we set forth alternative means for District Judges to structure conspiracy trials, that will allow the government to present its proof while at the same time protecting defendants from inadmissible hearsay evidence.

One acceptable method is the so-called "mini-hearing" in which the court, without a jury, hears the government's proof of conspiracy and makes the preliminary *Enright* finding.[3] If the hearsay is found admissible, the case, including co-conspirator hearsay, is presented to the jury. Although this procedure has been criticized as burdensome, time-consuming and uneconomic,[4] a trial judge, in the exercise of his discretion, may choose to order the proof in this manner if the circumstances warrant.

The judge may also require the government to meet its initial burden by producing the non-hearsay evidence of conspiracy first prior to making the *Enright* finding con-

[1] Fed. R. Evid. 611(a). *See also* United States v. James, 590 F.2d 575, 588 (5th Cir. 1979) (*en banc*) (Tjoflat, J. concurring).

[2] Fed. R. Crim. P. 52(a).

[3] This procedure was adopted by a panel of the Fifth Circuit, *United States* v. *James*, 576 F.2d 1121 (1978), and subsequently modified by an *en banc* court, 590 F.2d 575 (1979).

[4] *See* the majority and concurring opinions in the Fifth Circuit's *en banc* decision in *United States* v. *James*, 590 F.2d 575 (1979).

cerning the hearsay's admissibility. This procedure clearly avoids "the danger . . . of injecting the record with inadmissible hearsay in anticipation of proof of a conspiracy which never materializes." [5]

The judge may also, as was done here, admit the hearsay statements subject to later demonstration of their admissibility by a preponderance of the evidence. If this practice is followed, the court should stress to counsel that the statements are admitted subject to defendant's continuing objection and that the prosecution will be required to show by a preponderance of the evidence that a conspiracy existed, that the defendant against whom the statements are hearsay was a participant and that the statement was made in the course and in furtherance thereof. At the conclusion of the government's case-in-chief, the court should rule on the defendant's hearsay objection. If the court finds that the government has met the burden of proof described in *Enright*, it should overrule the objection and let all the evidence, hearsay included, go to the jury, subject, of course, to instructions regarding the government's ultimate burden of proof beyond a reasonable doubt and the weight and credibility to be given to co-conspirators' statements. If, on the other hand, the court finds that the government has failed to carry its burden, it should, on defendant's motion, declare a mistrial unless convinced that a cautionary jury instruction would shield the defendant from prejudice.[6]

If the trial judge does choose to admit the hearsay (a) after the government has established the conspiracy by a preponderance at the trial, or (b) at a "mini-

[5] United States v. Macklin, 573 F.2d 1046, 1049 n. 3 (8th Cir.), *cert. denied* —— U.S. ——, 99 S.Ct. 160 (1978).

[6] United States v. James, 590 F.2d at 581-83; United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978); United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied* 397 U.S. 1028 (1970).

hearing," or (c) conditionally subject to connection, he should refrain from advising the jury of his findings that the government has satisfactorily proved the conspiracy. The judge should not describe to the jury the government's burden of proof on the preliminary question. Such an instruction can serve only to alert the jury that the judge has determined that a conspiracy involving the defendant has been proven by a proponderance of the evidence.[7] This may adversely affect the defendant's right to trial by jury. The judge's opinion is likely to influence strongly the opinion of individual jurors when they come to consider their verdict and judge the credibility of witnesses.

Finally, we believe that, whatever procedure a District Judge uses, the hearsay statements themselves may be considered by the judge in deciding the preliminary question of admissibility. The preliminary finding of conspiracy for purposes of the co-conspirator exception to the hearsay rule is a "question concerning . . . the admissibility of evidence" governed by Fed. R. Evid. 104(a), and we believe that the final sentence of Rule 104(a)—stating that the judge "is not bound by the rules of evidence"—modifies prior law to the contrary.[8] The fact that the judge may consider under Rule 104(a) hearsay evidence which the jury could not consider is an added reason the judge should refrain from advising the jury of his findings.

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[7] Herein lies the error that defendants claim was committed in the instant case. In fact, the District Judge did not state to the jury his opinion or findings on the conspiracy, but perhaps his finding could be inferred from his ruling.

[8] *See* United States v. Enright, 579 F.2d at 985 n. 4. There is a split of authority on this question. *Compare* United States v. James, 590 F.2d at 592 (Tjoflat, J. concurring) and United States v. Martorano, 557 F.2d 1, 12 (1st Cir. 1977), *cert. denied* 435 U.S. 922 (1978) *with* United States v. James, 590 F.2d at 581 (Clark, J. for *en banc* court) and United States v. Bell, 573 F.2d at 1044 .

II.

We now turn to defendants' other claims:

1. Both defendants challenge the sufficiency of the evidence. The Sheriff argues that the testimony of the government's key witness, an executive of the coal company, was contradicted to such an extent as to render the verdict unsupportable. This key witness testified that the Sheriff came to see him, outlined the payoff scheme and sent the magistrate to collect the money. This testimony was most damaging, despite defense counsel's zealous attempts to rebut and impeach the witness. The fact that the jury chose to believe this witness and to disregard the Sheriff's attack on his credibility is no basis for reversal. The testimony was corroborated by other witnesses, and there was sufficient evidence from which the jury could find guilt beyond a reasonable doubt.

The evidence of the Magistrate's involvement in the conspiracy was also strong. A review of the record indicates that he twice collected extortion payments for the Sheriff from government agents acting undercover as coal company employees. The Magistrate made statements on at least two occasions which support an inference that he was aware that the payments were part of the extortion scheme. This evidence, as well as evidence of their association, was sufficient to support the verdict, and the jury was not required to accept the Magistrate's contrary explanation of events.

2. Both defendants claim to have been prejudiced by the District Judge's denial of severance. Fed. R. Crim. P. 14. The argument is that the Sheriff's and the Magistrate's defenses were mutually antagonistic in that each defendant sought to cast the blame on the other. Absent some indication that the antagonism between co-defendants misled or confused the jury, the mere fact that co-defendants attempt to blame each other does not compel

severance. *United States* v. *Perez*, 489 F.2d 51, 68 (5th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974).

3. Both defendants argue that they were prejudiced by the government's delay in producing discoverable information. *See* Fed. R. Crim. P. 16. Specifically, defendants claim that pre-trial statements of government witness Davis, which tended to exculpate them, were not provided until it was too late for defense counsel to use them effectively. Assuming, *arguendo*, that Davis' statements were exculpatory, defendants were given sufficient opportunity to see and make use of the statements. The Magistrate obtained the statements before the trial began, and the Sheriff obtained them during the government's direct examination of Davis. Indeed, the Sheriff's counsel made use of the statements during his cross-examination of the witness. At most, defendants have shown that they would have preferred to have obtained the statements earlier. But they have failed to show any government bad faith or prejudice resulting from the procedure that was actually followed.

4. The Sheriff claims that the District Court erred by refusing to instruct the jury to give less credence to witness Davis' testimony because he was a government informant. There is no evidence in the record to suggest that Davis was an informant, and, even if he had been, the court was not obliged to instruct the jury to this effect because his testimony was corroborated materially by other witnesses.[9] Moreover, the District Judge did instruct the jury to treat Davis' testimony with care because of evidence suggesting that he was an accomplice, and this had the same cautionary effect as if the judge had given the instruction the Sheriff requested.[10]

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[9] United States v. Garcia, 528 F.2d 580 (5th Cir.), *cert. denied* 426 U.S. 952 (1976); United States v. Lee, 506 F.2d 111 (D.C. Cir. 1974), *cert. denied* 421 U.S. 1002 (1975).

[10] *See generally* 2 WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 490 (1969 & Supp. 1979).

5. The Magistrate claims that he was prejudiced when the United States Attorney elicited on cross-examination an admission that he had two pistols in his possession at the time of his arrest. The District Court had previously indicated that the Magistrate's possession of handguns was irrelevant and had directed the prosecution not to inquire about the weapons. The prosecutor did not directly question the Magistrate about this subject, but the questions which elicited the admission were, arguably, an indirect attempt to circumvent the judge's admonition. We cannot be sure of the prosecutor's motive; but, taken in context, we do not believe the questions affected the verdict in any way.

6. The Sheriff argues that the District Court erred by allowing the jury to read transcripts of tape recordings while the tapes were being played in open court. Although it is the preferred practice that transcripts of tapes not be submitted to the jury unless there is a stipulation as to their accuracy,[11] we do not believe Vinson was prejudiced by the procedures followed in this case. The District Judge reviewed both the tapes and transcripts before they were presented to the jury. Defense counsel were given copies of the transcripts before their use at trial and an opportunity to point out discrepancies between the tapes and the transcripts. The jury was carefully advised that transcripts were only an aid and that the tapes were the substantive evidence, and only the tapes were allowed in the jury room.[12]

7. Vinson argues that the trial judge erred by permitting co-defendant Thompson to call witnesses to rebut evidence introduced by Vinson. After Thompson had

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[11] United States v. Smith, 537 F.2d 862, 863 (6th Cir. 1976); United States v. Bryant, 480 F.2d 785, 791 (2d Cir. 1973).

[12] *See* United States v. Rinn, 586 F.2d 113, 117-18 (9th Cir. 1978), *cert. denied* —— U.S. ——, 99 S.Ct. 2051 (1979).

rested his case, Vinson called a witness who testified that, on a certain date when Thompson claimed he had delivered money to Vinson, Vinson was, in fact, elsewhere. Since Vinson's proof of alibi followed the close of Thompson's case and came as a surprise to Thompson, the District Judge let Thompson put on proof to rebut Vinson's story and to rebuild Thompson as a witness. Vinson was allowed to cross-examine Thompson's rebuttal witnesses. Control of the order and method of presentation of evidence is left to the discretion of the trial judge. Fed. R. Evid. 611(a). The rebuttal testimony was relevant, and its presentation was not procedurally unfair to Vinson.

8. The Sheriff objected on hearsay grounds to the admission of two "payoff" envelopes bearing the name "Sheriff Charles Vinson" and to the testimony of an undercover agent that the envelopes were so marked for the purpose of delivery to the Sheriff. The marked envelopes themselves were not hearsay because the three words were not introduced as a true statement of fact but merely served to identify "real" evidence, *i.e.*, the envelopes in which the money was delivered. The words had operative effect regardless of the meaning the declarant intended them to have. *See* Fed. R. Evid. 801(c). The agent's testimony describing the purpose for which the Sheriff's name was written did not describe or recite an out-of-court statement at all but rather was a statement made by the witness in order to explain a past event. *Id.* He testified as to his own purpose as a participant in the preparation and delivery of the envelopes. The reliability of this evidence did not depend on "the language, sincerity, memory, or perception" of a declarant not present and subject to cross-examination.[13] We do not believe, in any event, that Vinson was prejudiced

[13] *See* E. MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 127, 149-62 (1956).

by this testimony because other evidence in the record convincingly shows that the envelopes and their contents were intended for delivery to Vinson.

9. Finally, the Sheriff argues that the District Court erred by limiting defense counsel's cross-examination of Davis. The Sheriff's counsel attempted to question Davis about a past scheme in which Davis and a third party had considered bribing the Sheriff. The cross-examination was offered to impeach Davis' credibility as a government witness. Fed. R. Evid. 608(b). The trial judge refused to allow the cross-examination on the ground that it was not "probative of truthfulness or untruthfulness." *Id.* Although it is arguable that prior misconduct of this nature is indicative of the witness' moral turpitude and, therefore, probative of his disregard for truth and honesty, such determinations under the rule are vested "in the discretion of the [trial] court." *Id.* We can find neither an abuse of discretion nor any significant harm to defendant. The question was remote on credibility and unrelated to the merits.

The judgments of conviction are AFFIRMED.